MICHIGAN SUPREME COURT

Office of Public Information

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EXTENT OF EXCLUSIONARY RULE TO BE CONSIDERED BY MICHIGAN SUPREME COURT IN ORAL ARGUMENTS; DEFENDANT SEEKS TO EXCLUDE STATEMENTS HE MADE AFTER HIS ATTORNEY LEFT HIM WITH POLICE

LANSING, MI, January 5, 2007 – Does the exclusionary rule – which has been applied to exclude evidence police obtained in unconstitutional searches and seizures – also bar statements a defendant made after his attorney left him with police? The Michigan Supreme Court will consider that issue in oral arguments next week.

In *People v Frazier*, the mother of 17-year-old Corey Frazier hired an attorney after she learned that police were looking for her son in connection with a double murder. The lawyer accompanied Frazier to the police station, where the teenager turned himself in, was read his rights, and waived his right to remain silent. The lawyer then left the police station, after encouraging Frazier to tell the police what he knew about the murders. Police charged Frazier on the basis of statements Frazier made during the interrogation, and Frazier was ultimately convicted of two counts of felony-murder, in addition to other crimes. A federal judge ordered that Frazier either be released or given a new trial, finding that the attorney's abandonment of Frazier at the police station amounted to a denial of Frazier's Sixth Amendment right to counsel. If Frazier was retried, the federal judge held, the statements that Frazier made to the police could not be used in evidence. The Michigan Supreme Court will consider whether the testimony of two prosecution witnesses – whom Frazier identified during his interrogation – must also be excluded. A divided Court of Appeals held that the prosecution could introduce the witnesses' testimony only if the prosecution established that it would have inevitably discovered the witnesses' identity by other means. One Court of Appeals judge dissented, arguing that the majority improperly extended the exclusionary rule to a situation in which there was no police misconduct.

The doctrine of standing – the legal right to sue – is at issue in *Rohde v Ann Arbor Public Schools*, in which a group of Ann Arbor taxpayers sued the Ann Arbor Public Schools. The plaintiffs contend that the school system violated Michigan's Defense of Marriage Act by using public funds to provide health insurance benefits to school employees' same-sex domestic partners. The Court will hear arguments on whether the plaintiffs in *Rohde* satisfied a state statute that provides that taxpayers must make a "demand" on public officials before suing to stop misappropriation of public funds. The school system contends, and the Michigan Court of Appeals agreed, that the plaintiffs did not satisfy the pre-suit requirement and so lack standing to sue.

Standing is also at issue in *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc.*, in which a group of Mecosta County residents and others seek to stop a commercial water pumping and bottling operation. In 2003, a circuit court judge ruled that Nestlé's operations would harm the environment and that Nestlé had to stop all pumping. While the Michigan Court of Appeals reversed part of the trial court's ruling to permit some pumping, a majority of the appellate court held that the plaintiffs had standing to pursue certain claims under the Michigan Environmental Protection Act (MEPA). The Supreme Court has directed the parties to address whether the plaintiffs have standing for their MEPA claims in light of the Court's ruling in *National Wildlife Federation v Cleveland Cliffs Iron Company*, 471 Mich 608 (2004). In *National Wildlife*, a majority of the Court stated that, to have standing under MEPA, plaintiffs must show that they have suffered or will suffer direct harm from an environmental problem.

The remaining cases feature medical malpractice, evidentiary, and procedural issues.

Court will be held on January 10 and 11**. Please note that oral arguments will begin at 2 p.m. on January 10.** On January 11, oral arguments will begin at the usual time of 9:30 a.m. The Court will hear oral arguments in its courtroom on the sixth floor of the Michigan Hall of Justice in Lansing.

(*Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available on the Supreme Court's web site at* http://courts.michigan.gov/supremecourt/Clerk/msc_orals.htm. *For further details about the cases, please contact the attorneys.*)

Wednesday, January 10
Afternoon Session

WASHINGTON v SINAI HOSPITAL OF GREATER DETROIT, et al. (case no. 130641)
Attorney for plaintiff Eula Washington, as Personal Representative of the Estate of Lisa B. Griffin: Robin H. Kyle/(313) 961-3975
Attorneys for defendants Sinai Hospital of Greater Detroit, d/b/a Sinai-Grace Hospital, Detroit Medical Center, Dr. Kunta, Thomas Piskorowski, D.O., and Dr. Al-Sayad: Linda M. Garbarino, Anita Comorski/(313) 964-6300
Attorneys for amicus curiae Masood Ahmad, M.D., Michigan Hospitalists, P.C., Henry Ford Health System, Michael S. Eichenhorn, M.D., and Vencor Hospital, a/k/a Kindred Hospital East, L.L.C., d/b/a Kindred Hospital Detroit: Susan Healy Zitterman/(313) 965-7905, Lee A. Stevens/(313) 962-8869, Ronald S. Lederman/(248) 746-0700
Attorney for amicus curiae American Physicians Assurance Corporation: Robert G. Kamenec/(248) 901-4068
Attorney for amicus curiae Michigan State Medical Society: Joanne Geha Swanson/(313) 961-0200
Trial court: Wayne County Circuit Court

At issue: A woman died after going to the emergency room at Sinai Hospital; her brother, as personal representative of her estate, sued the hospital and others for medical malpractice, but the trial court dismissed the lawsuit, stating that the complaint was filed after the statute of limitations expired. Does the estate's second personal representative have two years in which to file a medical malpractice lawsuit? Is any complaint filed by a successor personal representative barred by the legal doctrine of res judicata if the first personal representative filed a complaint?
Background: Lisa Griffin went to the emergency room at Sinai Hospital on February 28, 2000; she died of cardiac arrest on March 1, 2000. David Griffin, her brother, was appointed as the personal representative of her estate on March 16, 2000. On February 7, 2002, Griffin served the hospital and other defendants with a notice of intent to file a medical malpractice suit. He filed the lawsuit on September 25, 2002, two years and 208 days after the malpractice was alleged to have occurred, and two years and 193 days after his appointment as personal representative. The defendants moved to dismiss the case, arguing that the complaint was untimely because it was not filed within the two-year statute of limitations or within two years of Griffin's appointment as personal representative. The trial court granted the defendants' motion and dismissed the lawsuit on July 15, 2003. On August 26, 2003, Eula Washington, Lisa Griffin's mother, was appointed as successor personal representative of the estate; on September 16, 2003, Washington filed a complaint identical to the one Griffin had filed. The defendants filed another motion to dismiss. They argued that Washington's complaint was barred by the legal doctrine of res judicata, which bars suits based on claims that have already been finally decided in court. Res judicata applied, the defendants contended, because the two personal representatives of the estate were in privity – meaning that they represented the same interest of the estate – and the earlier dismissal was a decision on the merits of the case. The defendants also argued that the complaint was barred by the legal doctrine of collateral estoppel, which prevents parties from relitigating issues of fact or law that have already been determined by the court. The statute of limitations issue was fully litigated in the first suit, so collateral estoppel barred the court from revisiting the issue, the defendants maintained. In response, Washington contended that, under the Michigan Supreme Court's ruling in *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29 (2003), she had her own two-year period in which to file suit. The prior decision was not a decision on the merits entitled to res judicata effect, Washington argued. The trial court granted the defendants' motion, dismissing Washington's lawsuit. But in an unpublished per curiam decision, the Court of Appeals reversed the trial court, reasoning that "a grant of summary disposition on grounds that the statute of limitation has expired does not constitute an adjudication on the merits of a cause of action." The defendants appeal.

BARNETT v HIDALGO, et al. (case nos. 130071, 130073)
Attorneys for plaintiff Wapeka B. Barnett, Personal Representative of the Estate of James Otha Barnett, III, Deceased: Charles R. Ash, III, Richard D. Toth/(248) 355-0300
Attorney for defendants Cesar D. Hidalgo, M.D., and Cesar D. Hidalgo, M.D., P.C.: Rhonda Y. Reid Williams/(313) 961-2600
Attorney for defendants Renato Albaran, M.D., and Renato Albaran, M.D., P.C.: Julie McCann O'Connor/(248) 433-2000
Trial court: Oakland County Circuit Court
At issue: In this medical malpractice case, the court admitted the plaintiff's experts' affidavits of merit as substantive evidence and permitted their use at trial for impeachment; it also admitted into evidence a settling defendant's deposition testimony. Were the plaintiffs denied a fair trial?

Are affidavits of merit admissible at trial as substantive or impeachment evidence? Now that MCL 600.6304 and MCL 600.2957 require the finder of fact to determine and apportion the liability of non-parties, can a party make reference at trial to a defendant who has settled his liability with the plaintiff?

Background: James Barnett died after undergoing gall bladder surgery at Crittenton Hospital. Wapeka Barnett, the personal representative of Barnett's estate, sued Dr. Renato Albaran, Dr. Muskesh S. Shah, and Dr. Cesar D. Hidalgo, as well as the hospital. The hospital and Shah settled before trial. At trial, over the plaintiff's objections, the court admitted into evidence experts' affidavits of merit, which the plaintiff had filed with the lawsuit. Under Michigan law, a medical malpractice complaint must be accompanied by an affidavit of merit, signed by a health care professional qualified under MCL600.2169, setting forth (a) the applicable standard of care, (b) the opinion that the defendant breached the applicable standard of care, (c) the actions that should have been taken to avoid a breach of the applicable standard of care, and (d) the manner in which the breach was the proximate cause of plaintiff's injury. The court allowed defense counsel to use these affidavits of merit to impeach the plaintiff's expert witnesses. The jury returned a verdict of no cause of action, finding that neither Albaran nor Hidalgo was responsible for Barnett's death. The trial court entered judgment in favor of the defendants and denied the plaintiff's request for a new trial. Barnett appealed to the Court of Appeals, claiming that the trial court had denied her a fair trial by admitting the affidavits of merit as substantive evidence, and allowing them to be used to impeach her witnesses. Barnett also argued that the trial court erred by allowing defense counsel to use Shah's deposition for impeachment purposes. The defendants responded that the trial court's evidentiary rulings were appropriate, in light of the new theories of liability and causation that the plaintiffs' experts developed after Shah settled and was dismissed from the lawsuit. But in a published opinion, the Court of Appeals reversed the trial court and held that the plaintiff was entitled to a new trial. The appeals court concluded that the admission of various affidavits of merit as substantive and as impeachment evidence, together with the improper use of Shah's deposition testimony for impeachment purposes, denied the plaintiff a fair trial. The defendants appeal.

Thursday, January 11
Morning Session

PEOPLE v FRAZIER (case no. 131041)
Prosecuting attorney: Donald A. Kuebler/(810) 257-3248
Attorney for defendant Corey Ramone Frazier: Daniel D. Bremer/(810) 232-6231
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Timothy A. Baughman/(313) 224-5792
Attorney for amicus curiae Criminal Defense Attorneys of Michigan: Marla R. McCowan/(313) 256-9833
Trial court: Genesee County Circuit Court
At issue: After his attorney left the police station, the defendant made statements that were used against him at trial. A federal judge ruled that the defendant was entitled to a new trial because he was denied his Sixth Amendment right to counsel when his lawyer left him to be interrogated by the police; the judge ruled that those statements could not be used against the defendant in a second trial. Does the exclusionary rule – which excludes evidence obtained in violation of the Constitution – apply in this case, where the basis for exclusion is not police misconduct but the

attorney's abandonment of the defendant? Can the prosecutor introduce the testimony of witnesses whom the defendant identified during his interrogation?

Background: A witness told police that 17-year-old Corey Ramone Frazier was possibly involved in a double murder. Frazier's mother hired an attorney, who arranged for Frazier to surrender to the police. The attorney was present when Frazier was read his rights and when Frazier waived his right to remain silent. The lawyer then left the police station, after encouraging Frazier to tell the police what he knew about the murders. During the ensuing interrogation, Frazier made statements that caused the police to bring charges against him. He also identified two witnesses who ultimately testified at trial for the prosecution. After a 12-day jury trial, Frazier was convicted of two counts of felony-murder, one count of armed robbery, and two counts of felony-firearm. Frazier's state court appeals were resolved against him, so he filed a petition for habeas corpus relief in federal court. A federal judge granted Frazier's petition, concluding that Frazier's attorney's abandonment of him at the police station amounted to a denial of Frazier's Sixth Amendment right to counsel. The federal judge ruled that Frazier had to be released from prison unless he was retried within a certain period of time. If Frazier was to be retried, the judge held, the prosecutor would not be permitted to use the statements that Frazier made to the police during the interrogation. The prosecutor decided to retry Frazier. Before the second trial began, Frazier sought to suppress the testimony of two witnesses whom he identified during the interrogation; the trial court granted that motion. The prosecutor appealed to the Court of Appeals, which held in a published opinion that the prosecution could introduce the testimony of the two witnesses only if the prosecution established that it would have inevitably discovered the witnesses' identity through alternate means. One judge dissented, objecting that the majority improperly extended the exclusionary rule – which excludes evidence obtained in violation of a criminal defendant's Constitutional rights – to a situation in which there was no police misconduct. The prosecutor appeals.

ROHDE, et al. v ANN ARBOR PUBLIC SCHOOLS, et al. (case no. 128768)

Attorney for plaintiffs Teri Rohde, et al.: Patrick T. Gillen/(734) 827-2001

Attorney for defendants Ann Arbor Public Schools a/k/a Public Schools of the City of Ann Arbor, et al.: James M. Cameron, Jr./(734) 214-7660

Attorney for intervening defendant Ann Arbor Education Association, MEA/NEA: Arthur R. Przybylowicz/(517) 332-6551

Trial court: Washtenaw County Circuit Court

At issue: A state statute requires that, before taxpayers can sue to remedy the misappropriation of public funds, they must first make a "demand" on the appropriate public official "to maintain such suit . . . ." In this case, before filing suit, the plaintiffs sent letters to local and state officials asking that they "investigate and halt the use of public funds" for health care benefits for Ann Arbor public school employees. Did the plaintiffs satisfy the pre-suit demand requirement? Does the state statute, MCL 129.61, purport to grant standing to individual taxpayers? Is standing in this case controlled by the Michigan Supreme Court's decision in *National Wildlife Federation v Cleveland Cliffs Iron Company*, 471 Mich 608 (2004)?

Background: The plaintiffs are a group of Ann Arbor Public Schools (AAPS) taxpayers, who sued in 2003 to challenge AAPS's use of public funds to provide medical and dental insurance benefits to school employees' same-sex domestic partners. Using public funds for same-sex partner benefits violates Michigan's Defense of Marriage Act (DOMA), which defines marriage to exclude same-sex unions, the plaintiffs contend. Before filing suit, some of the named

plaintiffs sent a form letter to various AAPS board members and other local and state officials, asking them to "investigate and halt the use of public funds to provide so-called 'domestic partnership' benefits" and to "halt this illegal use of public funds at your earliest possible convenience." After the Ann Arbor Education Association (AAEA) intervened as a defendant on behalf of its members, the defendants sought to have the case dismissed, arguing that the plaintiffs lacked standing under MCL 129.61 to bring the suit. The statute provides that any taxpayer of a political subdivision "may institute suits or actions at law or in equity … for an accounting and/or the recovery of funds or moneys misappropriated or unlawfully expended by any public officer, board or commission of such political subdivision. Before such suit is instituted a demand shall be made on the public officer, board or commission whose duty it may be to maintain such suit followed by a neglect or refusal to take action in relation thereto." The trial court dismissed the case on the standing issue, finding that the plaintiffs had failed to bring their suit on behalf of the school district treasurer, and that they had failed to satisfy the statutory requirement of making a "demand" before filing suit. In a published per curiam decision, the Court of Appeals affirmed the trial court; the plaintiffs' requests to halt the "illegal use of public funds" did not satisfy the statute's demand requirement, the court stated. The plaintiffs seek leave to appeal. After hearing oral argument, the Supreme Court granted the plaintiffs' application for leave to appeal.

MICHIGAN CITIZENS FOR WATER CONSERVATION, et al. v NESTLÉ WATERS NORTH AMERICA INC. (case nos. 130802-3)

Attorneys for plaintiffs Michigan Citizens for Water Conservation, R. J. Doyle, Barbara Doyle, Jeffrey R. Sapp and Shelly M. Sapp: James M. Olson, Scott W. Howard/(231) 946-0044

Attorneys for defendant Nestlé Waters North America Inc.: John M. DeVries, Fredric N. Goldberg/(616) 632-8000

Attorney for amicus curiae Michigan Lake & Stream Associations, Inc.: Clifford H. Bloom/(616) 459-1171

Attorney for amicus curiae Michigan Manufacturers Association: Frederick R. Damm/(313) 965-8300

Attorney for amicus curiae Michigan Chamber of Commerce: John D. Pirich/(517) 484-8282

Attorney for amicus curiae Tip of the Mitt Watershed Council, Network of Lake Associations, Burt Lake Preservation Association, and Pickerel-Crooked Lakes Association: Ellen J. Kohler/(231) 883-1812

Attorney for amicus curiae National Wildlife Federation, Michigan United Conservation Clubs, Tip of the Mitt Watershed Council, Pickerel-Crooked Lakes Association, and Burt Lake Preservation Association: Neil S. Kagan/(734) 769-3351

Trial court: Mecosta County Circuit Court

At issue: This water use case concerns a conflict between riparian users (individual plaintiffs and persons represented by a conservation group) and a groundwater user (a spring-water bottling company). Do the plaintiffs have standing under the Michigan Supreme Court's ruling in *National Wildlife Federation v Cleveland Cliffs Iron Company*, 471 Mich 608 (2004), to bring all the claims set forth in their complaint?

Background: In 2000, Great Spring Waters of America, Inc., the predecessor in interest of Nestlé Waters of North America, began taking steps to construct a spring-water bottling plant in Mecosta County. In December 2000, Nestlé purchased the groundwater rights to property in an

area known as Sanctuary Springs. Shortly after Nestlé announced its plans to build its spring-water bottling plant, the nonprofit corporation Michigan Citizens for Water Conservation was formed to represent the interests of local riparian property owners and other interested persons. Nestlé installed four wells on the Sanctuary Springs site and obtained permits to use the wells from the Michigan Department of Environmental Quality. The combined maximum pumping rate permitted for the four wells is 400 gallons per minute. In the summer of 2001, Nestlé began to construct its bottling plant. In June 2001, Michigan Citizens, joined later by several individual plaintiffs, filed a lawsuit challenging Nestlé's right to build and operate the spring-water bottling plant. At a 2003 trial, the court determined that Nestlé's operations would have a harmful impact on the environment near the Sanctuary Springs site and ruled that Nestlé had to stop all pumping operations within 21 days. Nestlé appealed, and the Court of Appeals issued an order staying implementation of the trial court's 21-day deadline, although the appeals court ordered Nestlé to limit pumping to 250 gallons per minute. In a later published opinion, the Court of Appeals reversed part of the trial court's ruling, concluding that trial court applied the wrong legal standard when it analyzed whether Nestlé could operate its spring-water bottling plant. The Court of Appeals then applied what it determined was the proper standard, and ruled that Nestlé could pump some amount of water while still leaving adequate water supply for the plaintiffs' various uses. The Court of Appeals remanded the case to the trial court, directing it to make additional factual findings in order to determine what level of pumping would be reasonable. A dissenting judge would have held that the plaintiffs lacked standing to bring certain claims under the Michigan Environmental Protection Act (MEPA). But the Court of Appeals majority disagreed, finding that the plaintiffs had standing as to all the natural resources at issue because of the nature of the ecosystem, the hydrologic interactions, and the pumping activities that were affecting the resources in question. Both the plaintiffs and the defendant have appealed. The Supreme Court has directed the parties to appear for oral argument on the applications, and to file supplemental briefs addressing only whether the plaintiffs have standing under *National Wildlife Federation v Cleveland Cliffs Iron Company*, 471 Mich 608 (2004), to bring certain of their claims. In *National Wildlife*, a majority of the Court stated that, in order to sue under MEPA, plaintiffs must show that they have suffered or will suffer direct harm from an environmental problem.

Afternoon Session

CLERC v CHIPPEWA COUNTY WAR MEMORIAL HOSPITAL, et al. (case nos. 129438, 129482)

Attorney for plaintiff Richard T. Clerc, Personal Representative of the Estate of Saralyn M. Clerc, Deceased: Mark R. Bendure/(313) 961-1525

Attorney for defendant Chippewa County War Memorial Hospital: Susan Healy Zitterman/(313) 965-7905

Attorney for defendant Robert Baker, M.D.: Robert G. Kamenec/(248) 901-4068

Trial court: Chippewa County Circuit Court

At issue: In this medical malpractice case, the trial court ruled that the plaintiff's experts' causation testimony was speculative and unreliable. When a trial court conducts an evidentiary hearing pursuant to Michigan Rule of Evidence 702 and determines that the proponent of an expert has not put forth sufficient evidence that the expert's testimony is "the product of reliable principles and methods," is the trial court required to conduct a more searching inquiry before it

may exclude the expert testimony? If a qualified medical expert testifies that ethical considerations preclude conducting a scientific study that would yield supporting data for the expert's opinion, are the expert's own knowledge and experience sufficient to establish a reliable basis for the expert's opinion?

Background: Saralyn Clerc sought medical treatment for symptoms that were consistent with pneumonia. In July 1997, radiologist Dr. Robert Baker reviewed an x-ray of Clerc's lungs and reported no abnormal findings. In February 1998, Clerc was diagnosed with advanced lung cancer that had metastasized to lymph and cardiac tissues. She died in March 1999. The plaintiff, the personal representative of Clerc's estate, sued both Baker and the hospital with which he was affiliated, alleging that Baker misread the 1997 x-ray and that his negligence delayed the diagnosis and treatment of Clerc's cancer, causing her death. The plaintiff retained two causation experts, Dr. Stephen Veach and Dr. Barry Singer, who testified that, had Clerc's cancer been diagnosed in July 1997, she would have had a greater than 50 percent chance of surviving the cancer. Both doctors gave their opinion that Clerc's cancer would have been at an early stage in 1997. In so testifying, Singer stated, he was relying on his "general experience" as an oncologist. The defendants filed separate motions to strike Veach and Singer's testimony, arguing that it was speculative and lacked a reliable scientific basis; accordingly, the trial court should dismiss the lawsuit; the defendants contended. The trial court agreed, ruling that the plaintiff's experts did not have a scientific basis for asserting that Clerc's cancer was at Stage I or Stage II in July 1997. The court characterized as mere "speculation and conjecture" the plaintiff's experts' contention that, had Clerc's cancer been diagnosed in July 1997, she would have had a greater than 50 percent chance of surviving the cancer. The plaintiff appealed. In a published opinion, the Court of Appeals vacated the trial court's ruling and remanded for further proceedings. It held that the trial court "failed to properly exercise its function as a gatekeeper of expert opinion testimony in striking plaintiff's experts' testimony without either conducting a more searching inquiry under its obligation to preclude speculative and unreliable evidence under [Michigan Rule of Evidence] MRE 702" or holding a more detailed evidentiary hearing. The Court of Appeals held that the trial court should have determined whether the method used by the plaintiffs' experts to determine the stage of Clerc's lung cancer in 1997 had achieved general scientific acceptance for reliability, and directed the court to do so on remand. The defendants appeal.

STURGIS BANK AND TRUST COMPANY v HILLSDALE COMMUNITY HEALTH CENTER (case no. 130045)

Attorney for plaintiff Sturgis Bank and Trust Company, Conservator of the Estate of Tanya E. Walling, a legally incapacitated individual: William L. Benefiel/(269) 388-4353

Attorney for defendant Hillsdale Community Health Center: Graham K. Crabtree/(517) 482-5800

Trial court: Hillsdale County Circuit Court

At issue: MCL 600.2912d requires a plaintiff in a medical malpractice case to file an affidavit of merit that addresses the applicable standard of care and medical causation. The affidavit of merit must be signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under MCL 600.2169. Should the plaintiff's medical malpractice complaint against the defendant nurses be dismissed because her affidavits of merit were signed by nurses, who can testify as to the standard of care but may not be able to testify as to medical causation?

Background: MCL 600.2912d(1) provides that, in medical malpractice actions, a plaintiff or the

plaintiff's attorney "shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness" under MCL 600.2169. The statute states that the affidavit of merit must contain a statement of (a) the applicable standard of care, (b) the manner in which the standard of care was breached, (c) the actions that should have been taken (or omitted) in order to comply with the standard of care, and (d) the manner in which the breach of the standard of care was the proximate cause of the alleged injury. The plaintiff, conservator of the estate of Tanya Walling, sued Hillsdale Community Health Center for medical malpractice, claiming that the alleged negligence of the hospital's nursing staff caused Walling to fall from her bed and suffer a closed-head injury. In addition to the complaint, the plaintiff filed two affidavits of merit, signed by a registered nurse and a nurse practitioner; their affidavits detailed the alleged lapses in the nursing staff's care and asserted that those lapses caused Walling's injury. The defendant moved to dismiss the case, arguing that the plaintiff did not satisfy the requirements of § 2912d(1). The required affidavit of merit had to contain a statement regarding proximate cause, but the two nurses were not qualified to offer a medical opinion regarding the cause of Walling's injury, the defendant contended. The plaintiff maintained that the two affidavits of merit were sufficient, but it also filed a third affidavit from a neurologist that addressed the issue of proximate cause. The trial court first denied the defendant's motion but, on reconsideration, granted it. The trial court agreed that the nurses were not qualified to offer an opinion about medical causation. In this case, the court concluded, two affidavits of merit were required: one signed by a nurse, because this was the health profession practiced by those accused of malpractice, and one signed by a doctor, who would offer testimony as to proximate cause. The trial court held that the doctor's affidavit submitted by the plaintiff could not be considered because it was filed after the statute of limitations expired. In a published opinion, the Court of Appeals reversed, holding that the nurses' affidavits signed were sufficient for purposes of § 2912d(1) and § 2169, even if the nurse and the nurse practitioner did not have the expertise or qualifications necessary to establish proximate cause. The Court of Appeals concluded that the "plaintiff was only required to submit an affidavit of an expert practicing or teaching in the same health care profession as those accused of wrongdoing and that the affidavit contain the necessary elements listed in § 2912d(1)(a)-(d)." The defendant appeals.

BATES v GILBERT, et al. (case nos. 129564-67, 129569-72)
Attorney for plaintiff Joeann Bates: Mark Granzotto/(248) 546-4649
Attorneys for defendant Dr. Sidney Gilbert: Robert G. Kamenec, Kristen M. Netschke/(248) 901-4068
Attorney for defendant D&R Optical Corporation, d/b/a Health Center Optical: Ronald S. Lederman/(248) 746-0700
Trial court: Wayne County Circuit Court
At issue: MCL 600.2912d requires a plaintiff suing for medical malpractice to file an affidavit of merit that addresses the applicable standard of care and medical causation. The affidavit of merit must be signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under MCL 600.2169. MCL 600.2912e imposes a similar requirement on the defendant, who must file an affidavit of meritorious defense. Should the plaintiff's medical malpractice complaint against an optometrist be dismissed because her affidavit of merit was signed by an ophthalmologist, who cannot testify about the standard of care of an optometrist? May one defendant satisfy its obligation to file an affidavit of meritorious

defense by filing a reliance on the affidavit of merit filed by another defendant? May a defendant physician sign his own affidavit of meritorious defense?

Background: Joeann Bates was examined by Sidney Gilbert, an optometrist at D&R Optical. Bates sued both Gilbert and D&R for medical malpractice, alleging that Gilbert failed to perform glaucoma testing when he examined her, and that she is legally blind as a result of his alleged negligence. Bates filed an affidavit of merit, as required by MCL 600.2912d, signed by an ophthalmologist. Both D&R Optical and Gilbert filed answers to the complaint. Gilbert then filed an affidavit of meritorious defense that he signed himself. One week later, D&R Optical filed a document stating that it relied on Gilbert's affidavit. The defendants then filed a motion for summary disposition, arguing that an ophthalmologist is not qualified to sign an affidavit regarding the standard of care of an optometrist. The trial court denied this motion, acknowledging that an ophthalmologist "is not an optometrist," but reasoning that an optometrist would not have been able to attest to medical causation, and that, under the circumstances, Bates' attorney had a "reasonable belief" that the ophthalmologist was qualified to sign the affidavit of merit. Bates then moved to strike Gilbert's affidavit of meritorious defense and asked the court to enter a default as to both defendants. The trial court agreed with Bates that an affidavit of meritorious defense could not be signed by the defendant physician. The trial court also agreed that D&R Optical had violated MCL 600.2912e by relying on Gilbert's affidavit rather than filing an affidavit of its own. Accordingly, the trial judge granted Bates' motion to strike the affidavit of meritorious defense; the court defaulted both defendants as to liability. In an unpublished opinion, a majority of the Court of Appeals affirmed the trial court's denial of the defendants' motion for summary disposition. But the Court of Appeals reversed the order striking the affidavit of meritorious defense and the entry of default, concluding that defense counsel could have reasonably believed that Gilbert could execute the affidavit himself and could have reasonably believed that Gilbert was qualified, to sign the affidavit. The Court of Appeals agreed with the trial court that D&R Optical could not rely on another party's affidavit of meritorious defense. But the Court of Appeals remanded the case to the trial court for further proceedings, saying that there were other remedies for D&R's error besides a default, and that the case involved "complex interpretation of a convoluted statutory scheme." The dissenting Court of Appeals judge concluded that Bates' attorney could not have reasonably believed that an ophthalmologist could sign an affidavit of merit in a case alleging negligence by an optometrist. Bates could have filed two affidavits to satisfy all the requirements of MCL 600.2912d(1)(a)-(d), the dissenting judge said, adding that the defendants should have done the same. The dissenting judge would have dismissed the case as a result of the errors in Bates' affidavit of merit. Both the defendants and Bates appeal.

GLENN v MARTENS, et al. (case no. 131257)

Attorney for plaintiff Dorothy Glenn, Personal Representative of the Estate of Andrew Glenn, Deceased: Mark R. Bendure/(313) 961-1525

Attorney for defendants Hal F. Martens, D.O. and Consultants in Arthritis & Allied Conditions: Steven G. Silverman/(313) 963-8200

Trial court: Genesee County Circuit Court

At issue: The trial court barred the defendants from calling an independent standard of care expert witness, as a sanction for filing their affidavit of meritorious defense one day late. The court also ruled that the defendants could present standard of care testimony through the defendant physician or any other treating physician. Did the court abuse its discretion?

Background: Dorothy Glenn, as personal representative of the estate of Andrew Glenn, sued Dr. Hal Martens and several other defendants for medical malpractice. Glenn satisfied all of the procedural prerequisites for commencing a medical malpractice action, including filing an affidavit of merit in support of her complaint. Under MCL 600.2912e(1), the defendants were required to file an affidavit of meritorious defense within 91 days, or by July 25, 2002, after Glenn filed her affidavit of merit. The defendants obtained an affidavit of merit from Dr. Paul Wenig on July 23, 2002. The next day, the affidavit of merit was mailed to the plaintiff, but it was not filed with the court until July 26, 2002. The defendants explain that the late filing was because the messenger employed by defense counsel's office misread his instructions, which in fact directed him to file the affidavit with the court on July 24. Glenn moved for summary disposition, claiming that the defendants' failure to timely file the affidavit of meritorious defense amounted to a failure to state a valid defense under Michigan Court Rule (MCR) 2.116(C)(9). The trial judge agreed and entered a default against the defendants on the issues of negligence and proximate cause, while commenting that he might make a different decision if he had some discretion. In an unpublished opinion, the Court of Appeals reversed the trial court's ruling. The Court of Appeals concluded that the trial court did have the discretion to determine the appropriate sanction for the late filing of an affidavit of meritorious defense, and that default was merely one of several options. The Court of Appeals remanded for a determination of the proper remedy. On remand, the trial court ruled that the defendants could call Martens or any other treating physicians to testify regarding the standard of care, but that the defendants could not present testimony from an independently retained standard of care witness at trial. The Court of Appeals affirmed this ruling in an unpublished opinion. The defendants appeal.

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